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NO. COA11-14
NORTH CAROLINA COURT OF APPEALS

Filed: 1 November 2011

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 09 CRS 209479

DONALD DEMETRIUS HARRIS
(AKA HAKUM MUSTA BEY)

Appeal by Defendant from judgment entered 17 June 2010 by Judge Jesse B. Caldwell in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 August 2011.

Attorney General Roy A. Cooper, by Assistant Attorney General Marc X. Sneed, for the State.

Winifred H. Dillon, for Defendant.

BEASLEY, Judge.

Donald Demetrius Harris (Defendant) appeals from a judgment entered in the Superior Court of Mecklenburg County on 17 June 2010, denying his motion to suppress. We affirm.

On 23 June 2009, Officer Richard Canfield of the Charlotte-Mecklenburg Police Department was dispatched to assist animal control on a dog bite incident. When Officer Canfield arrived, he was informed that a black male with dreadlocks exited 231 Cox

Avenue, picked up the dog in question, and drove it away from the scene in a gold Ford Fusion. As Officer Canfield approached the residence, he saw a gold Ford Fusion parked out front. Officer Canfield, accompanied by Officer Karen L. Dula, knocked on the door of the residence and Defendant answered. Officer Canfield asked Defendant several questions, including his name, whether he was the owner of the residence, and how many people were in the house with him. Defendant refused to identify himself or answer any questions. Officer Canfield smelled the odor of marijuana on Defendant, as well as coming from inside the residence. While Officers Canfield and Dula stood at the door of the house waiting for other officers, they were able to see into the interior of the house and they observed a woman turning the lights off in the house. In an effort to see the woman's action, both officers shined their flashlights into the interior of the house. When the house was illuminated, both officers believed they saw a rifle in a corner that was within four to five feet of the woman. Officer Canfield then observed the woman leave the room. At this point, Officer Canfield contacted his supervising sergeant and requested permission to secure the house and obtain a search warrant. A search was conducted pursuant to a search warrant and officers seized a .9 millimeter handgun, magazines, and ammunition.

On 6 July 2009 Defendant was indicted for possession of a firearm by a felon. Defendant filed a motion to suppress the evidence and his statements. The hearing on the motion was held 17 June 2010. The trial court denied Defendant's motion to suppress, and Defendant pled guilty and specifically reserved his right to appeal the denial of his motion to suppress.

Defendant's sole argument on appeal is that exigent circumstances did not exist to justify the police officers' warrantless search of the home by flashlight. We disagree.

Our Court's review of a denial of a motion to suppress is limited to a determination of "whether the trial court's findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law." *State v. Tadeja*, 191 N.C. App. 439, 443, 664 S.E.2d 402, 406-07 (2008) (internal quotation marks omitted).

The Fourth Amendment to the United States Constitution provides "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" U.S. Const. amend. IV. "[A] Fourth Amendment search does not occur -- even when the explicitly protected location of a house is concerned -- unless the individual manifested a subjective expectation of privacy in the object of the challenged search, and society [is] willing to recognize that expectation as reasonable." *Kyllo v.*

United States, 533 U.S. 27, 33, 150 L. Ed. 2d 94, 101 (2001) (internal quotation marks and citations omitted). Our Supreme Court has held that "it is well established that protection under the Fourth Amendment only extends to those areas where an individual has a legitimate expectation of privacy, which has two components: (1) the person must have an actual expectation of privacy, and (2) the person's subjective expectation must be one that society deems to be reasonable." *State v. McNeil*, 165 N.C. App. 777, 783, 600 S.E.2d 31, 35-36 (2004) (internal quotation marks and citations omitted).

In this case, the pivotal question is not whether exigent circumstances existed to support the officers' use of the flashlights to see inside Defendant's home, but whether the use of the flashlights is considered a search within the purview of the Fourth Amendment. If the use of the flashlights did not constitute a search, then the Fourth Amendment protections are not triggered and there would be no exigent circumstances requirement. Conversely, if the use of the flashlights constitutes a search, then the Fourth Amendment protections are triggered and the analysis would be premised on whether there was legal justification for the warrantless search.

In order to determine whether the use of the flashlights constituted a search within the meaning of the Fourth Amendment,

we must determine whether Defendant had a reasonable expectation of privacy.

Defendant relies on the United States Supreme Court's decision in *Kyllo*. In *Kyllo*, the Court announced that government intrusion on an individual's reasonable expectation of privacy without a physical intrusion into the residence was unreasonable and violative of the Fourth Amendment where officers used thermal imaging from outside a house to collect information about what was going on inside the house. *Kyllo*, 533 U.S. at 29-30, 150 L. Ed. 2d at 99-100. Defendant asks this Court to extend the reasoning of *Kyllo* to this case. *Kyllo's* rationale is inapplicable where the Defendant *sub judice* is confronted with flashlights which are used by the general public. *See id.* at 34, 150 L. Ed. 2d at 101 ("We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' constitutes a search -- at least where (as here) the technology in question is not in general public use." (internal quotation marks and citations omitted)).

Further, Defendant argues that our Supreme Court's decision in *State v. Tarantino*, 322 N.C. 386, 368 S.E.2d 588 (1988), is dispositive of the issue. We disagree. In *Tarantino*, a

detective was given information by an unreliable informant about marijuana growing on the second floor of a building. *Id.* at 387, 368 S.E.2d at 589. The informant also told the detective that he could see the marijuana by looking through the cracks in the building. *Id.* Based on the tip, the detective went to the building to investigate. He found the door to the building padlocked and the windows boarded up. The officer reached the rear of the building, climbed to the second floor porch, entered the open porch, found cracks in the wall that he illuminated with his flashlight, and observed marijuana through the cracks in the wall. *Id.* at 387-388, 368 S.E.2d at 590. Our Supreme Court held that the defendant had a reasonable expectation of privacy in the building because

> [t]he building's padlocked front door, nailed back doors, and boarded windows indicate that defendant had a subjective expectation of privacy in his building's interior. This expectation was not unreasonable even though there were small cracks between the boards in the building's back wall. The presence of tiny cracks near the floor on the interior wall of a second-floor porch is not the kind of exposure which serves to eliminate a reasonable expectation of privacy. To hold otherwise would result in an unfairly exacting standard. It would require owners of non-residential buildings who want to enjoy their Fourth Amendment rights to maintain their structures almost as airtight containers. The Supreme Court has never imposed such a standard, and we decline to do so in this case.

Id. at 390-91, 368 S.E.2d at 591.

Here, Defendant opened the door to police officers and engaged in a discussion with officers. Also, the officers shined the flashlights through the open front door while standing outside the house. Officers were lawfully at the residence investigating the dog biting incident. Moreover, the officers used their flashlights for safety when the woman turned off the lights. Therefore, *Tarantino* is not controlling.

In order to determine whether the use of the flashlight was a search within the meaning of the Fourth Amendment, we must first consider whether Defendant had a subjective expectation of privacy and if so, whether that expectation was reasonable. It is well established that individuals have a reasonable expectation of privacy in their homes. *See Kyllo*, 533 U.S. at 31, 150 L. Ed. 2d at 101 ("At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." (internal quotation marks omitted)). But this expectation is diminished when the door to the home is opened by the defendant.

We find the rationale of *United States v. Dunn*, 480 U.S. 294, 94 L. Ed. 2d 326 (1987) applicable to this case. In *Dunn*, the Court held "the officers' use of the beam of a flashlight,

directed through the essentially open front of [the defendant's] barn, did not transform their observations into an unreasonable search within the meaning of the Fourth Amendment." *Id.* at 305, 94 L. Ed. 2d at 337. Our Supreme Court, in reading *Dunn*, explained that "[b]ecause the barn's interior was exposed to the public from an unprotected vantage point, the Court held that the officers' inspection was not a Fourth Amendment violation." *Tarantino*, 322 N.C. at 390, 368 S.E.2d at 591. "Under these circumstances the Court declared it would not require the officers to shield their eyes from that which was exposed to public view." *Id.* at 391, 368 S.E.2d at 592 (internal quotation marks and citations omitted).

Defendant's argument is overruled.

Affirmed.

Judges BRYANT and GEER concur.

Report per Rule 30(e).